BANK KERJASAMA RAKYAT MALAYSIA BHD A

v.

PSC NAVAL DOCKYARD SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
ROHANA YUSUF J
[CIVIL SUIT NO: D4-22A-329-2006]
14 DECEMBER 2007

CIVIL PROCEDURE: *Summary judgment - Islamic banking - Bai Al Inah facility - Default - Whether sum claimed too exorbitant - Whether no defence to merit trial - Whether plaintiff entitled to summary judgment - Order 14 Rules of the High Court 1980* C

The plaintiff bank had granted an Islamic banking facility of *Bai Al Inah* to the defendant. By the facility, the plaintiff purchased certain quoted shares from the defendant for a cash consideration of RM15 million and sold the same to the defendant for a purchase price of RM23,437,500. It was a term of the facility that the defendant would repay the said sum of RM23,437,500 by way of 59 installments of RM140,625 each and one last installment of RM15,140,625. The defendant repaid the sum owed till August 2004 or thereat, but had since defaulted resulting in the termination of the facility. Having terminated the facility, the plaintiff sued the defendant for the whole sum due thereunder amounting to RM15,418,147.41, and applied for summary judgment of the claim pursuant to O. 14 Rules of the High Court 1980. Summary judgment was however refused by the Deputy Registrar, allegedly for reasons that: (i) the quantum claimed, being more exorbitant than even the 'interest-ridden loan under the conventional facility', ought to be litigated upon (following *Affin Bank Bhd v. Zulkifli Abdullah*); and (ii) there was uncertainty as to the assets used in the transaction and the alleged date of default. This was the plaintiff's appeal against the decision. D E F G

Held (allowing the appeal; granting summary judgment): H

(1) The defendant did not make it clear what the basis of its comparison is when comparing Islamic Banking facility to that of the conventional banking facility. If the defendant is referring to the judgment sum of RM582,626.80 with a daily profit of RM98.54 allowed in the *Affin Bank*'s case, as compared to RM958,997.94 claimed by the bank therein, then its argument on this point is seriously flawed. (para 6) I

(1a) It is to be noted that in *Affin Bank*, the sum of RM958,997.94 claimed by the bank and disallowed by the court was the final amount that the bank could obtain as a judgment sum under the relevant Islamic banking facility. Be that as it may, the judgment sum of RM582,626.80 with a daily profit of RM98.54 awarded to the bank by the court therein could run to a limitless figure, and could even exceed the total sale price of 958,997.94 stated in the agreement. In short, subject to the defendant therein realizing the amount quickly, the lesser sum awarded could exceed the amount claimed by the bank. (para 6)

(2) In the present case, the amount claimed by the plaintiff has already reached its maturity and therefore no issue of unearned profit could arise. Consequently, the argument that the plaintiff had based its claim on the full purchase price so as to obtain unearned profit would not hold water. It follows further that the contention that Islamic banking is more burdensome than conventional banking remains a mere speculation. (para 7)

(3) Certainty is a basic requirement in any contract whether under the Islamic law or under the Contracts Act 1950. However what is certain and what is uncertain is a question of fact. Therefore, the issue to be determined here is whether the assets sold in the form of quoted shares as enumerated in the first schedule to the agreement is uncertain. (para 12)

(3a) The quoted shares here are clearly stipulated and their lot numbers are also stated very clearly. At the point of entering into the agreement, the defendant was aware of what it has purchased and no issue of uncertainty was then raised. Consequently, both parties were *ad idem* as to the quoted shares and the particular shares and number of shares that formed the subject matter of sale. In any case, if the descriptions of the shares are not clear to the defendant, there is no reason why it should agree to the agreement and pay up part of the purchase price. (paras 13 & 14)

(4) The facts showed that when the bank terminated the facilities vide its letter of 7 February 2005, the defendant, far from challenging the amount claimed, had in fact requested for the period of payment to be extended for another

12 months. This very conduct of the defendant showed that it has full knowledge of what and when the breach took place. (para 16)

(5) The defendant had not raised any defence with merits to deserve a trial. This is therefore a plain and obvious case for summary judgment to be entered against the defendant under O. 14 of the RHC. (paras 17 & 18)

Case(s) referred to:
Affin Bank Bhd v. Zulkifli Abdullah [2006] 1 CLJ 438 HC ***(dist)***
Bank Islam Malaysia Berhad v. Adnan Omar [1994] 3 CLJ 735 HC ***(refd)***
Boustead Trading (1985) Sdn Bhd v. Arab Malaysia Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 30
Rules of the High Court 1980, O. 14

For the plaintiff - Khairuddin Abd Ghani; M/s Amir Ruhana & Khairuddin
For the defendant - Farah Mohd Afzal; M/s Thanggaiya Zawawi & Co

Reported by WA Sharif

JUDGMENT

Rohana Yusuf J:

[1] The plaintiff, in encl. 14, is appealing against the decision of the learned deputy registrar who has dismissed the application of the plaintiff under O. 14 of the Rules of the High Court 1980 (RHC). I have allowed the appeal of the plaintiff on the grounds set out below.

Background Facts

[2] The claim of the plaintiff bank is in the sum of RM15,418,147.41 being an outstanding amount due and owing under an Islamic banking facility granted by the bank to the defendant. First, the defendant sells quoted shares to the bank under the asset sale agreement dated 24 January 2000 and exhibited in AA1 at RM15,000,000 on cash terms. The bank then entered into an agreement described as the asset sale agreement of even date and exhibited in AA2 where the plaintiff bank sells to the defendant those shares at a purchase consideration RM23,437,500. The term of payment by the defendant is by way

of deferred installments. The liability to pay the bank back by the defendant under the asset sale agreement in AA2 is by way of sixty monthly installments. The 1st to 59th installments are at RM140,625 each and the final installment is at RM15,140,625 for the 60th month. The basis of the claim of the plaintiff is under the AA2 of the asset sale agreement. Accordingly, this transaction is a transaction called *Bai Al-Inah* as decribed in recital III of the agreement. It is also a term of the agreement that a security deposit of RM300,000 is paid by the defendant pursuant to cl. 3, to be retained by the bank for the purpose of set-off against outstanding installments due.

The assets involved is in the form of quoted shares on the Kuala Lumpur Stock Exchange, described in item 3 of the first schedule of the agreement as follows:

Counter	No. of Shares
C & C Bintang	300,000
RJ REYNOLDS	680,800
MATSHUSHITA	217,000
ACPI	380,000
ESSO	666,000
HUME	231,000
SHELL	450,000

[3] The defendant has defaulted in the installment payment and the bank acted under the said cl. 3, liquidated the security deposit, to contra the outstanding due by the defendant. At the end of the 60th month, there is still an outstanding sum due and owing and remained payable amounting to RM15, 418,147.41. This is the amount that the plaintiff is claiming against the defendant.

[4] In resisting the application of the plaintiff for a summary judgment of the said sum under O. 14 RHC 1980, the defendant raises the following three triable issues.

Quantum Claimed Exorbitant

[5] The first issue raised by the defendant is on the quantum of the plaintiff's claim. In raising this defence the counsel for the defendant contended that the amount claimed by the bank was too exorbitant as compared to the normal conventional banking facility. According to the counsel for the defendant this is because in conventional banking a borrower needs only pay back the amount borrowed and accrued interest due at the point of default, but in the case of Islamic banking facility an Islamic bank will compute the amount due, inclusive of profit margin to the end of the tenure of facility, which will allow the Islamic bank the unaccrued profit amount. In that way according to the counsel the amount of outstanding due under Islamic banking facility will be exorbitant as compared to its conventional counterpart. Learned counsel cited the High Court decision in *Affin Bank Bhd v. Zulkifli Abdullah* [2006] 1 CLJ 438, in support of such contention. In that case, the learned High Court Judge remarked (at p. 446) "that a borrower under a 'Riba-ridden loan' is far better off". The learned judge in the above case has refused the claim of Affin Bank for an amount of RM958,997.94 but instead allowed a judgment sum of RM582,626.80 with a daily profit of RM98.54.

[6] The counsel for the defendant does not make it clear what, in comparing the Islamic Banking facility to that of conventional banking facility, the basis of comparison is. If the counsel is referring to the judgment sum allowed in the *Affin Bank*'s case in support of her contention, her argument on this point is seriously flawed. If one were to compare the amount claimed by Affin Bank of RM958,997.94 (assuming that the figure was rightly claimed) with the judgment sum of RM582,626.80 with daily profit granted by the court, one will note that the sum of RM958,997.94 claimed will be the final amount that the bank may obtain as a judgment sum in an Islamic banking case. This is because Islamic banking judgment sum should not carry a judgment interest. Whereas, a judgment sum of RM582,626.80 with a daily profit of RM98.54 will run to a limitless figure which may eventually exceed the total sale price of RM958,997.94 stated in the agreement. Subject to the defendant realizing the amount quickly, the figure can exceed the claimed amount by the bank.

[7] Coming back to the present case the amount claimed by the plaintiff here has already reached its maturity. No issue of unearned profit can arise. So even if the submission of the counsel refers to the fact of Islamic bank basing the claim on full purchase price (would include unearned profit if the claim is made before expiry of its terms which can be said to be exorbitant), this argument does not support her in the present case, since the amount of the claim herein has reached its maximum tenure. In other words there is no issue on unearned profit in the present claim. Thus beside making a mere sweeping statement and citing the *Affin Bank* case above as her authority the defendant makes no other attempt to illustrate how her contention on this point could be substantiated. Thus the contention of the counsel for the defendant that Islamic banking is more burdensome than conventional banking remains a mere speculation and totally baseless. In fact the counsel's submission on this point remains a mere sweeping statement.

[8] But what good would such contention offer to the defence in the present case? The counsel for the plaintiff in his submission argued that the defendant opted for Islamic banking facility at its own choice and freewill. There is neither allegation of coercion or misrepresentation nor any evidence before me to suggest that the defendant has been forced to choose this particular facility in preference to all those available in the market. As such, the issue of whether the Islamic Banking facility is more exorbitant than other banking facility is never a defence available to the defendant in the first place. Having made that choice freely, the defendant cannot now come to court to repudiate and deny its liability on such a ground. The defendant is a company in business and would be in the position to make a choice diligently as compared to for example, an individual borrower.

[9] Parties have agreed before executing the agreements, and without any undue pressure or persuasion, to the preconditions of the Islamic based contracts. Parties also agreed to be bound by the terms to conclude the agreement. The defendant also agreed that the whole purpose of the sale transaction is to provide the banking facility it required. The decision of the High Court in *BIMB v. Adnan bin Omar* [1994] 3 CLJ 735 cited to me by the counsel for the plaintiff that the transaction between parties were made with the defendant having full knowledge that the transaction was an exercise to provide the required facility to the defendant, is good decision of which I have full agreement.

Certainty

[10] The second issue raised by the defendant is on 'uncertainty' of the assets used in the transaction. The defendant contended that the assets transacted, being quoted shares on the Bursa Saham Kuala Lumpur valued at a price consideration of RM23,437,500 is not certain or clear as no certificate numbers of the quoted shares are disclosed in the agreement. According to the counsel for the defendant, a transaction based on such uncertainty is prohibited in Islamic Law. The counsel for the defendant cited in authority the hadith of the Prophet Muhammad s.a.w. which states:

> The Messenger of Allah forbade me to sell a thing which is not my property or selling something that is not apparent and seen clearly.

[11] A contract both under Islamic law and under the Contracts Act 1950 requires certainty. I am not clear why the above authority has been cited without referring to s. 30 of the Contracts Act 1950. Section 30 of the Contracts Act 1950 provides that, agreements the meaning of which is not certain, or capable of being made certain are void. In doing this I am now equating the requirement of certainty in the Contracts Act as being similar to that of the requirement of certainty in Islamic law of contract. This is because I find no basic difference between the requirements of certainty in the Islamic law of contract or that of the Contracts Act in s. 30. I would not also be wrong to generally state that the Contracts Act 1950 can accommodate Islamic contract transactions because of the similarities in the various requirements of contract under both concepts.

[12] Certainty is a basic requisite in any contract. However, what is certain and what is uncertain is a question of fact. Therefore the issue to be determined here is whether the assets sold in the form of quoted shares as enumerated in the first schedule to the agreement as stipulated in para. 2 above is uncertain. The counsel for the defence argued that there is lack in certainty of the enumerated shares as the certificate numbers are not stipulated. Due to such uncertainty the defendant was not aware of the shares it was buying and as such the contract is void under the principles of Syariah.

[13] As shown in para. 2 above, the quoted shares are clearly stipulated and the numbers of lots are stated very clearly. At the point of entering into the agreement the defendant was aware of what it has purchased and no issue of uncertainty was then raised. Such argument is rather startling because it was raised after the event. The defendant after signing and agreeing to purchase these quoted shares from the bank, had made various installments for payment and upon being sued for default then only realised that the assets it was purchasing was not certain because no certificate numbers were attached to the quoted shares. The further submission made by the counsel for the defendant is even more perplexing, when she submitted that since the agreement is an Islamic banking transaction, the requirement of certainty should be of a higher degree. She even suggested that if this agreement were to be based on the conventional banking it would be certain enough but not so since it was an Islamic banking transaction. I fail to apprehend this argument. As I have stated earlier, what is certain and what is uncertain are issues of fact and there is no reason why certainty under the Contracts Act or the Islamic banking contract should be any different. If the defendant is suggesting that the requirement of certainty is higher, this being the contract that is to comply with Syariah requirement, then the counsel for the defendant ought to have demonstrated how and what is the degree of certainty that will be so required in a Syariah based contract as opposed to the contracts under the Contracts Act.

[14] Coming back on the certainty requirement, what is plain and clear in the agreement and the conduct of the parties is that both parties are *ad idem* as to the quoted shares listed on KLSE and the particular shares and number of shares that are subject to sale for example, 300,000 shares of C & C Bintang. If the descriptions of these shares are not clear to the defendant, then why should the defendant agree to enter into such agreement and on top of it paid up part of the purchase price. Such defence is a sham and lacking in creativity and the defendant should be estopped from raising this defence. In fact the law of estoppel is obviously applicable to the defendant in raising such arguments.

[15] If adhering to Islamic principle is an issue of importance to the defendant over this matter then perhaps the defendant ought to be reminded that, fulfillment of a promise in Islam is a religious demand. In Chapter 5 Verse 1 the Quran declares that: *O you who believe! Fulfill all your obligations*. A covenant is a solemn undertaking

or engagement between man and his obligations to God, between man and his soul and between the individual and his fellow men which covers the entire area of a man's moral and social responsibilities. In Chapter 17 Verse 34 again it is stressed the importance of fulfilling of one's promise when the Verse states: *And fulfill (every) engagement, for every engagement will be enquired into (on the day of reckoning)*. These verses show that a contract in Islamic Jurisprudence is not a mere binding legal relation but it is based on certain moral and religious principles. The defendant had obtained the facility to assist its business with a promise to repay in accordance with the terms stipulated in the agreement. Since the defendant has raised concerns on the various principles of the contract which should be adhered to in a syariah based agreement, then fulfilling those agreed obligations as per the stipulations in the agreement should be of paramount importance that the defendant should be fulfilling without even a demand having been made.

Date Of Breach Not Certain

[16] The third issue raised by the defendant is that the date of default was not made known to the defendant. The defendant alleged that the plaintiff has failed to state the date of the breach by the defendant and hence it is not clear when the cause of action had arisen. The plaintiff has claimed from the defendant the four months outstanding settlement amounting to RM504, 863.16 as at 31 December 2004. No dispute was raised by the defendant to the exh. AA9 in the plaintiff's affidavit on the outstanding amount. The plaintiff in fact in response to the defendant's request could not agree to extend the facility to another tenure of 12 months. When the defendant failed to pay up that outstanding installments, the plaintiff terminated the facilities by way of a letter dated 7 February 2005 as in exh. AA10 and claimed the whole amount due of RM15,418,147.41. The defendant never challenged the amount claimed by the plaintiff and in fact requested for the period of the payment to be extended for another 12 months as appeared in exh. MA11. This very conduct by the defendant shows that it has full knowledge of what and when the breach took place. It is ridiculous for the defendant to raise ignorance of the date of breach after having taken all these steps.

Conclusion

[17] In conclusion, the defendant has failed to raise any defence with merits to deserve a trial. In fact the defendant should be estopped from raising all these issues as its defence. The issue of whether the defendant had chosen a banking facility which is more exorbitant than the other available products or the conduct of the defendant in having agreed to be bound and in fact complied with the terms of the agreement by installment payment but subsequently claimed the agreements to be uncertain, are situations that invite the application of the doctrine of estoppel. The decision of the Court of Appeal in *Boustead Trading (1985) Sdn Bhd v. Arab Malaysia Merchant Bank Bhd* [1995] 4 CLJ 283 is a clear authority that the defendant by its own conduct has waived all the issues raised as its defence in the present case. The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless. Looking at the conduct of the defendant in this case I have no doubt that the defendant should be estopped from raising any of defences raised above.

[18] As no defence with merits has been raised to warrant any issue for trial, I find that this is a plain and obvious case for a summary judgment under O. 14 of the RHC to be entered against the defendant. I therefore allow the appeal by the plaintiff in encl. 14 for a summary judgment to be entered against the defendant with costs.